

Counsel listed on the following page.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

MICHAEL MONACO, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

D.A. DAVIDSON COMPANIES,
Defendant.

Case No. 5:16-cv-00332-SJO-DTB

CLASS ACTION

**NOTICE OF MOTION AND
MOTION FOR ATTORNEYS' FEES,
COSTS, AND CLASS
REPRESENTATIVE AWARD;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Complaint Filed: February 24, 2016

Trial Date: March 28, 2017

Date: January 30, 2017

Time: 10:00 a.m.

Place: Courtroom 10C

Before: Hon. S. James Otero

MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE AWARD; MEMO OF
POINTS AND AUTHORITIES

Case No. 5:16-CV-00332-SJO-DTB

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MICHAEL MONACO, on behalf of himself
and all others similarly situated

**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that on Monday, January 30, 2017 at 10:00 a.m., in Courtroom 10C on the 10th floor of the above-captioned Court, located at 350 W. 1st Street, Los Angeles, California 90012, the Honorable S. James Otero presiding, Plaintiff Michael Monaco, on behalf of himself and all others similarly situated, will, and hereby does, motion for this Court to:

1. Award \$48,285 in attorneys' fees;
2. Award \$7,723.45 in litigation costs and expenses;
3. Award a class representative award of \$5,000 to Plaintiff Michael Monaco for his services on behalf of the Settlement Class. This Motion is unopposed by Defendant D.A. Davidson Companies.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and Authorities in Support of the Motion for Attorneys' Fees, Costs, and a Class Representative Award; (3) the Declaration of Kyann C. Kalin; (4) the Declaration of Donald W. Heyrich the records, pleadings, and papers filed in this action; and such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion.

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2 This motion is made following the conference of counsel pursuant to L.R. 7-3
3 which took place on December 22, 2016.
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6 DATED: December 30, 2016.

STUTHEIT KALIN LLC

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8 By: /s/Kyann C. Kalin
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10 Kyann C. Kalin

11 Attorneys for Plaintiff
12 Michael Monaco, on behalf of himself
13 and all others similarly situated
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I. INTRODUCTION

Plaintiff Michael Monaco brings this motion for attorneys' fees in the amount of \$48,8285; costs of \$7,723.45; and a Class Representative Award of \$5,000. This Motion follows a settlement reached between Plaintiff and Defendant D.A. Davidson Companies ("Defendant" or "D.A. Davidson") to resolve Plaintiff's claims that that D.A. Davidson violated federal and state laws regarding background checks, including the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*; the California Consumer Reporting Agencies Act ("CCRAA"), California Civil Code § 1785.1 *et seq.*; California Investigative Consumer Reporting Agencies Act ("ICRAA"), California Civil Code § 1786 *et seq.* as well as California unfair practices law under California Business and Professions Code § 17200 *et seq.*¹ Those class members who have not requested exclusion from the settlement will receive an automatic cash payment without having to submit a claim form. Rather than reverting back to Defendant, any uncashed or returned checks from distribution will go to a *cy pres* designee, United Way of Montana.

Because Plaintiff has obtained valuable relief for the Class, he now seeks an award of attorneys' fees that equates to 33.3% of the non-reversionary settlement fund of \$145,000, along with his litigation costs. This award is fair and reasonable, and comports with California and Ninth Circuit decisions that award fees from 25 to 40 percent of a common fund. Only seven Class Members (0.47%) have opted out, and none have objected. These low numbers, as well as other factors discussed below, support Plaintiff's request for an award of fees and costs.

¹ Plaintiff also brought an individual claim under the Washington Fair Credit Reporting Act, Wash. Rev. Code. § 19.182.020(c).
 MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE AWARD; MEMO OF POINTS AND AUTHORITIES - 1
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3 Plaintiff also requests \$5,000 for his service as a Class Representative. The
4 requested payment serves two purposes. First, it compensates Plaintiff for the
5 countless hours he has invested in this case to make sure that justice is obtained for
6 over 1,400 of his peers. Second, it compensates Plaintiff for the claims that he
7 could have prosecuted on an individual basis.

8 For the reasons set forth below, Plaintiff respectfully asks this court to grant
9 his request for attorneys' fees, costs, and Representative Plaintiff award.

10 **II. FACTS AND PROCEDURE**

11 **A. Overview of the Litigation**

12 Defendant, D.A. Davidson Companies ("D.A. Davidson"), is an investment
13 services company that provides integrated brokerage, capital markets, asset and
14 portfolio management, and trust and wealth management services and products.

15 In September 2015, Plaintiff Michael Monaco, a resident of Colton, California
16 at the time, applied for an IT Application Specialist position with D.A. Davidson,
17 and, as part of his application process, Mr. Monaco was provided with D.A.
18 Davidson's "Authorization for Employer Access to Consumer Reports"
19 ("Authorization") so that the company could run a background check on him.
20 Plaintiff alleges that D.A. Davidson's authorization form contained technical
21 violations of the FCRA, the California Credit Reporting Agencies Act ("CCRAA")
22 and the California Investigative Consumer Reporting Agencies Act ("ICRRA").
23 (Dkt. 1.) Finally, Plaintiff alleged on an individual, rather than class-wide, basis
24 that Defendant violated the Washington Fair Credit Reporting Act, Wash. Rev.
25 Code. § 19.182.020(c), when it procured Plaintiff's consumer report although a
26 credit report was not "substantially job related" to the IT position for which he
27 applied.

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2 **B. Plaintiff's Investigation and Discovery**

3 Prior to filing of this action, Plaintiff thoroughly investigated his claims.
4 Plaintiff also has conducted investigation and discovery after filing the action in
5 order to prove up his claims and rebut D.A. Davidson's defenses. As part of the
6 investigation, Plaintiff's counsel requested and reviewed documents produced by
7 D.A. Davidson in order to determine the size of the class and the extent of the
8 FCRA, CCRA and ICRAA violations. (*See* Declaration of Donald W. Heyrich In
9 Support of Plaintiff's Motion for Attorneys' Fees and Costs ("Heyrich Fees Decl."),
10 Ex. A.) Because this case largely turns on D.A. Davidson's legal defense that
11 Settlement Class Members suffered no "actual injury" and that D.A. Davidson's
12 noncompliance was purportedly not "willful" under the FCRA, Plaintiff's counsel
13 reviewed and analyzed case law governing FCRA and analogous state law class
14 actions, as well as articles and commentaries. *Id.* This analysis and investigation
15 allowed Plaintiff's counsel to structure a settlement that provides benefits directly
16 to the persons who were forced to sign allegedly defective forms.

17 **C. The Parties' Arms'-Length Settlement Negotiations**

18 The proposed Settlement was reached after the parties engaged in a thorough
19 analysis of the pertinent facts and law at issue and after a July 29, 2016, mediation
20 in San Francisco conducted by the Martin Quinn of JAMS. (Heyrich Fees Decl. ¶6.)

21 **D. The Class Action Settlement Has Been Widely Accepted by**
22 **the Class Members**

23 Of the 1,480 notices mailed out, there have been no objections and less than
24 0.5 % of the class has opted-out. (Declaration of Beth Verdekal On Behalf of
25 Claims Administrator Re Notice Procedure ("Verdekal Decl."), ¶¶8, 10.) These
26 numbers show that all but a handful of Class Members support the settlement.

This suggests that the fairness of the settlement—and the attorneys’ fees and costs—are acceptable to the Class.

III. ARGUMENT

A. The Court Should Grant Plaintiff’s Request for Attorneys’ Fees and Costs Because the Request is Fair and Appropriate.

1. The Request for 33.3% of the Fund is Reasonable Under Ninth Circuit and California District Court Precedent.

Plaintiff’s attorneys’ fee request is well within the range of reasonable requests. The typical range of acceptable attorneys’ fees in class action cases in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% being considered the “benchmark.” *See Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989). Moreover, California district courts frequently award, and the Ninth Circuit affirms, fees greater than the benchmark. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F3d 454,460 (9th Cir. 2000); *Bond v. Ferguson Enters., Inc.*, 1:09-cv-1662 OWW MJS, 2011 WL 2648879, *9-11 (E.D. Cal. June 30, 2011)(“[T]he exact percentage varies depending on the facts of the case, and in ‘most common fund cases, the award exceeds that benchmark.’”) (citation omitted); *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377-78 (N.D. Cal. 1989) (concluding that the best “practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%); *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) (same). Even a court’s grant of 34% of the fund as attorneys’ fees would be “supported by the fact that typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved

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3 before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores, LLC*,
4 CV 06-04149 MMM SHX, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21,
5 2008).

6 Because Plaintiff’s requested attorneys’ fees, representing 33 1/3% of the
7 entire settlement fund, is consistent with established Ninth Circuit and California
8 district court precedents, the request should be granted.

9 **2. The Lodestar Cross-Check Affirms the Reasonableness of**
10 **the Fee Request.**

11 A basic lodestar cross-check multiplies the number of hours counsel
12 reasonably expended on the litigation by a reasonable hourly rate. *See Hanlon v.*
13 *Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). “The lodestar figure is a
14 presumptively reasonable amount of attorney’s fees.” *S.E.C. v. Sunwest Mgmt.,*
15 *Inc.*, 524 Fed. Appx. 365, 367 (9th Cir. 2013), *citing Perdue v. Kenny A. ex rel.*
16 *Winn*, 559 U.S. 542 (2010). When the lodestar method is used as a cross-check, it
17 need not be performed via an exhaustive review of each of counsel’s hours. *See In*
18 *re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (“The lodestar
19 cross-check calculation need entail neither mathematical precision nor bean-
20 counting.”); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D.
21 Cal. 2007) (“Although counsel have not provided a detailed cataloging of hours
22 spent, the Court finds the information provided to be sufficient for purposes of
23 lodestar cross-check.”).

24 Class Counsel and their affiliated attorneys and staff expended over 240
25 hours. (See Declaration of Kyann C. Kalin In Support of Plaintiff’s Motion for
26 Attorney’s Fees and Costs (“Kalin Decl.”) ¶2, Heyrich Fees Decl., ¶8, Ex. A.)
27 These hours are reasonable if for no other reason than Class Counsel knew that it

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3 was possible they would never be paid for their work. Thus, counsel had no
4 incentive to act in a manner that was anything but economical. *See Moreno v. City*
5 *of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“[L]awyers are not likely to
6 spend unnecessary time on contingency cases in the hope of inflating their fees.
7 The payoff is too uncertain, as to both the result and the amount of the fee.”). That
8 said, counsel took their responsibility seriously and endeavored to represent the
9 interests of the class members to the greatest extent possible.

10 The attorney fee rates requested for approval range from \$375 to \$595 per
11 hour. (*See* Kalin Decl. ¶2, Heyrich Fees Decl., ¶¶9-10). These rates are reasonable
12 under southern California standards. *See Klee v. Nissan N. Am., Inc.*,
13 CV1208238AWTPJWX, 2015 WL 4538426, at *13 (C.D. Cal. July 7, 2015), *aff’d*
14 (Dec. 9, 2015) (approving rates ranging from \$370 to \$695); *Aarons v. BMW of N.*
15 *Am.*, No. 11-7667-PSG, 2014 WL 4090564, at *16 (C.D. Cal. Apr. 29, 2014),
16 *objections overruled*, CV 11-7667 PSG CWX, 2014 WL 4090512 (C.D. Cal. June
17 20, 2014) (approving rates ranging from \$390-\$775, based in part on “the Court’s
18 own experience with hourly rates in the Los Angeles area”); *In re Toys R Us-*
19 *Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295
20 F.R.D. 438, 462-64 (C.D. Cal. 2014) (approving rates ranging from \$220 to \$600);
21 *Parkinson v. Hyundai Motor Am.*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010)
22 (approving rates ranging from \$445 and \$675); *POM Wonderful, LLC v. Purely*
23 *Juice, Inc.*, No. CV 07-2633, 2008 WL 4351842, *4 (C.D. Cal. Sept. 22, 2008)
24 (approving rates ranging from \$275 to \$750).

25 In addition, respected surveys of law firm hourly rates reflect rates higher
26 than those requested by lead counsel in this case. For example, the Laffey Fee
27 Matrix (now called the USAO Attorneys’ Fee Matrix) is frequently relied upon by

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3 district as well as California Superior Courts. *See e.g. Fernandez v. Victoria Secret*
4 *Stores, LLC* (C.D. Cal. 2008) 2008 WL 8150856 *14-15; *Nemecek & Cole v. Horn*
5 (2012) 208 Cal.App.4th 641, 651. This matrix is publically available and regularly
6 updated study of average hourly billing rates. The 2015 to 2016 Matrix lists an
7 hourly rate of \$504 for an attorney with 16-20 years experience (like Ms. Kalin)
8 and \$530 for attorneys' with 20 years of experience (like Mr. Heyrich). (Kalin
9 Decl., ¶5, Ex. B.)

10 The 2013 National Law Journal annual survey reports average partner billing
11 rates of \$550 for California based employment defense firm Littler Mendelson, and
12 of \$600 for Perkins Coie LLP, the law firm for which two of the Class Counsel in
13 this case worked earlier in their careers. (Kalin Decl., ¶¶6, 7, Ex. C.; Heyrich Fees
14 Decl., ¶2.) These rates have undoubtedly increased in the last three years. Based on
15 this information, and the experience of the Class Counsel, the requested hourly
16 rates are reasonable.

17 By multiplying the attorneys' reasonable hours worked by the reasonable
18 hour rates provides the base lodestar attorney fee award of \$91,613. (Kalin Decl.
19 ¶¶ 2-3; Heyrich Fees Decl. ¶8.) However, class counsel is only seeking \$48,285.
20 Thus, Class Counsel's request is 48 percent less than the base lodestar which they
21 may otherwise be able to recover. Thus, the lodestar cross-check substantiates the
22 reasonableness of Plaintiffs' request for just under 33 1/3% of the Common Fund to
23 be approved as compensation to Class Counsel for the attorney fees incurred to
24 obtain the settlement which now benefits the class.

25 **3. Plaintiff's Expenses Should be Reimbursed.**

26 "Reasonable costs and expenses incurred by an attorney who creates or
27 preserves a common fund are reimbursed proportionately by those class members

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3 who benefit from the settlement.” *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp.
4 1362, 1366 (N.D. Cal. 1996), *citing Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-
5 92 (1970). Class Counsel worked hard to bring this case to a successful resolution
6 and the fees and costs payment provided for in the settlement is fair and reasonable.
7 In advancing this lawsuit, Class Counsel incurred out-of-pocket costs to date
8 totaling \$7,723.45 (Kalin Decl., ¶10; Heyrich Fees Decl., ¶12, Ex. B.) These out-
9 of-pocket costs were necessary to secure the resolution of this litigation. *See In re*
10 *Immune Response Sec. Litig.*, 497 F. Supp. 2d at 1177-78 (finding that costs such as
11 filing fees, photocopy costs, travel expenses, postage, telephone and fax costs,
12 computerized legal research fees, and mediation expenses are relevant and
13 necessary expenses in a class action litigation). In light of the expenses Class
14 Counsel has had to incur to bring this case to its current settlement posture, Class
15 Counsel’s request for \$7,723.45 in costs, is reasonable.

16 **B. The Court Should Grant Plaintiff’s Request for a**
17 **Representative Plaintiff Award Because it is Reasonable.**

18 Representative Plaintiff awards, or incentive awards, are payments of money
19 to class representatives that “are intended to compensate class representatives for
20 work done on behalf of the class, to make up for financial or reputational risk
21 undertaken in bringing the action, and, sometimes, to recognize their willingness to
22 act as a private attorney general. Awards are generally sought after a settlement or
23 verdict has been achieved.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59
24 (9th Cir. 2009). These awards became “routine” about the turn of this century. *See*
25 *Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action*
26 *Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1311 (2006) (a survey of
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3 settled class actions between 1993 and 2002). Thus now, “[i]ncentive awards are
4 fairly typical in class action cases.” *Rodriguez*, 563 F.3d at 958.

5 Because incentive awards are so common, many courts in the Ninth Circuit
6 use the *Van Vranken* test to determine whether a Class Representative award is fair
7 and reasonable. Under this test, the court analyzes “(1) [the] risk to the class
8 representative in commencing a class action, both financial and otherwise; (2) the
9 notoriety and personal difficulties encountered by the class representative; (3) the
10 amount of time and effort spent by the class representative; (4) the duration of the
11 litigation; (5) the personal benefit, or lack thereof, enjoyed by the class
12 representative as a result of the litigation” *Grant v. Capital Mgmt. Servs., L.P.*, 10-
13 CV-2471-WQH BGS, 2014 WL 888665, at *7 (S.D. Cal. Mar. 5, 2014). Not all
14 factors must be present; a Court instead may weigh the factors and award fees that
15 are “just and reasonable under the circumstances.” *See In re Toys “R” Us-Del.*, 295
16 F.R.D. at 472 (citing *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300
17 (N.D. Cal. 1995)).

18 Here, the proposed award to Mr. Monaco of \$5,000 is fair and consistent
19 with the amount typically awarded in class actions. *See In re Mego Fin. Corp. Sec.*
20 *Litig.*, 213 F.3d at 457, 463 (approving incentive awards of \$5,000); *Faigman v. AT*
21 *& T Mobility LLC*, C-06-04622-MHP, 2011 WL 672648, at *5 (N.D. Cal. Feb. 16,
22 2011) (“incentive payments of \$5,000 are presumptively reasonable”); *Fernandez*
23 *v. Home Depot, U.S.A., Inc.*, 8:13-cv-00648-DOC-RNB, Dkt. No. 58 (C.D. Cal.
24 Jan. 22, 2016) (order granting pl.’s mot. for atty’s fees, costs, and a class
25 representative enhancement payment); *Aguayo v. Oldenkamp Trucking*, F04-6279
26 AWI LJO, 2006 WL 3020943, at *8 (E.D. Cal. Oct. 17, 2006) (preliminarily

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3 approving a \$5,000 class representative award in case where total settlement fund
4 was \$129,300).

5 Moreover, in the *Alberto* case cited by this Court, even though the *Alberto*
6 court initially had concerns about the representative plaintiff's \$5,000
7 representative award, it ultimately found the payment to be reasonable. *Alberto v.*
8 *GMRI, Inc.*, CIV 07-1895 WBS DAD, 2008 WL 4891201, at *12 (E.D. Cal. Nov.
9 12, 2008). In that case, class members were to receive only \$24.17 each, but the
10 court decided that the \$5,000 was "not particularly unfair to other class members,
11 given that it [would] not significantly reduce the amount of settlement funds
12 available to the rest of the class [and] none of the class members [] objected to the
13 amount of additional compensation sought by the named plaintiff." *Id.*
14 Additionally, plaintiff had spent 50 hours prosecuting her case. *Id.*

15 In this case, the class members will receive approximately two times the
16 settlement value than the *Alberto* class members because estimated payments to
17 class members are in the \$45 range. Additionally, payment to Mr. Monaco will not
18 significantly reduce the Class Members' payments. Even if Mr. Monaco were to
19 receive no payment, the class member payments would increase only a few dollars.
20 Further, no class members have objected to Mr. Monaco's additional compensation
21 for his efforts to prosecute this case.

22 On a public policy note, courts also consider how approving incentive
23 awards can encourage future class representatives to step forward to represent the
24 interests of other classes. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
25 ("Because a named plaintiff is an essential ingredient of any class action, an
26 incentive award is appropriate if it is necessary to induce an individual to
27 participate in the suit."). Thus, an appropriate incentive award will encourage others

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3 to step forward to help provide justice to classes of people who cannot obtain
4 justice individually. Here, Plaintiff Michael Monaco stepped forward to advance
5 the interests of the class. His representation of the class proved essential to
6 obtaining the relief provided for the class in the settlement agreement. (Heyrich
7 Fees Decl. ¶7.)

8 Here counsel for Mr. Monaco and the class spoke with him many times on
9 the phone and exchanged dozens of emails with him sent him. Mr. Monaco was
10 also sent and reviewed many of the documents in the case before they were
11 exchanged with opposing counsel or submitted to the Court. Additionally, he
12 participated by telephone for the mediation. (Heyrich Fees Decl., ¶7.)

13 Mr. Monaco also made sacrifices in this case that should not be overlooked.
14 For instance, he had an individual claim under Washington State law that alone
15 entitled him to actual damages (including back pay, front pay, and emotional
16 distress damages), reasonable attorneys' fees and costs, and an additional monetary
17 penalty of \$1,000. However, Mr. Monaco was willing to forego his own personal
18 interests in order to obtain a settlement for the entire class. Mr. Monaco should be
19 granted a Class Representative Award for his efforts, the risks he assumed, and
20 individual claims he relinquished in order make sure the rest of the Class Members
21 would be compensated. He agreed to generally release *all* of the claims he did and
22 could bring against Defendant. Absent an award for his services, he would recover
23 no more than other Class Members despite his hard work and sacrifice in bringing
24 and prosecuting this case. Therefore, Plaintiffs respectfully ask the Court to
25 approve the Representative Plaintiff award for Mr. Monaco that is provided by the
26 settlement agreement.

IV. CONCLUSION

The Parties have negotiated a fair and reasonable settlement on behalf of Class Members. Accordingly, Plaintiffs request that this Court grant the Motion for Attorneys' Fees, Costs, and Class Representative Award.

DATED: December 30, 2106

STUTHEIT KALIN LLC

By: /s/Kyann C. Kalin

Kyann C. Kalin

Attorneys for Plaintiff

Michael Monaco, on behalf of himself and
all others similarly situated